

**Jerry Rudibaugh**

**Municipal Tax Hearing Officer**

**DECISION OF MUNICIPAL TAX HEARING OFFICER**

Decision Date: April 12, 2002

Decision: MTHO #13

Taxpayer: Taxpayer

Tax Collectors: City of Phoenix

Hearing Date: February 27, 2002

**DISCUSSION**

**Introduction**

On September 27, 2001, Taxpayer filed a letter of protest with the Municipal Tax Hearing Office of a City of Phoenix ("City") tax assessment. After review, the City filed its October 1, 2001 finding that the protest was in the proper form but was not timely. On October 5, 2001, the Municipal Tax Officer ("Hearing Office") ordered the Taxpayer to file its response to the timeliness issue on or before November 19, 2001. On October 9, 2001, the Taxpayer filed its response on the timeliness issue. On October 15, 2001, the Hearing Officer ordered the City to file its reply on the timeliness issue. Based on the additional information filed by the Taxpayer, the City concluded in its October 24, 2001 letter that the protest was timely. On November 2, 2001 the Hearing Officer ordered the City to file its response to the protest on or before December 26, 2001. On December 10, 2001, the City filed its response to the protest. On December 31, 2001, the Municipal Tax Hearing Office scheduled the matter for hearing commencing at 10:00 a.m. on February 27, 2002.

The Taxpayer is in the owner and developer of a six lot residential subdivision. In June of 2000, the Taxpayer sold an improved lot (the "A" property). In April of 2001, the Taxpayer sold a second improved lot (the "B" property).

**City Position**

The City obtained information that the Taxpayer had sold an improved lot in June of 2000. On January 25, 2001, an auditor attempted to contact the Taxpayer by leaving a message. On February 1, 2001, the auditor contacted the owner of Taxpayer and explained the speculative builder tax to him. The City attempted, unsuccessfully, over the next several months to obtain

needed documentation from the Taxpayer in order to complete its audit. On April 9, 2001, the City sent a certified letter to the Taxpayer requesting needed documentation be sent to the City no later than April 24, 2001. The City received no response so they utilized the Affidavit of Property Values from Maricopa County to arrive at their assessment, which was then mailed to the Taxpayer.

The City assessed the two sales pursuant to Phoenix City Code Section 14-416(a)(1) ("Section 416") which provides that "the gross income of a speculative builder considered taxable shall include the total selling price of improved real property at the time of closing of escrow or transfer of title". Because the Taxpayer was not aware of the speculative builder tax at the time of the sale of the "A" property, the City did not assess any penalty in addition to the tax assessment. However, the City concluded the Taxpayer was fully aware of the speculative builder tax at the time of the sale of the "B" property. For that reason, the City assessed a penalty for failure to file when due pursuant to Phoenix City Code Section 14-540 (b)(1) ("Section 540 (b)(1)") and a penalty for failure to pay the tax when due pursuant to Phoenix City Code Section 14-540 (b)(2) ("Section 540 (b)(2)") on the "B" sale.

### **Taxpayer Position**

The Taxpayer asserted that he was not aware of the speculative builder tax at the time he sold the "A" property. According to the Taxpayer, he had asked both North American Title Agency and Capital Title Agency (collectively hereafter referred to as "Title Agencies") if there was any City tax on the sales of property. The Title Agencies informed the Taxpayer that they did not have knowledge of a City's builder tax. Further, the Taxpayer asserted that at no time during the development review process with the City was there any mention of a tax license requirement or a builder's tax. As a result, the Taxpayer requested that the tax not be enforced on the sale of the "A" property.

In March of 2001, the Taxpayer was contacted by the City regarding the tax on the sale of his improved property. While the sale of the "B" property was not completed until April of 2001, the Taxpayer asserted that he still did not fully comprehend the tax at that time. Consequently, the Taxpayer requested a waiver of the penalties assessed on the "B" property sale.

### **ANALYSIS**

Section 416 requires that the total selling price from the improved real property at the time of closing of escrow or transfer of title to be taxable gross income of a speculative builder. While the Taxpayer was not aware of this tax at the time of the sale of the "A" property, the tax must still be paid. Otherwise, those businesses that were aware of the law and paid the taxes would be placed at a disadvantage.

Because the Taxpayer was unaware of the law at the time of the sale of the "A" property, the City concluded the Taxpayer had reasonable cause for not filing returns or timely paying taxes. For that reason, the City did not impose any penalty on that sale. The City had discussions with the Taxpayer beginning in February of 2001 regarding the speculative builder tax. For that reason, the City assessed penalties pursuant to Section 540(b)(1) and (2) for failure to file and

failure to pay taxes when due on the second sale that occurred in March of 2001.

While the City did have discussions with the Taxpayer prior to completion of the sale of the "B" property, we note that the discussions were within a month or two of the sale completion date. Further, the Taxpayer testified under oath that he was still confused by the tax. Because of

the advice the Taxpayer had received from the Title Agencies, as well as the fact that no mention was made of the tax during the development review process, the Hearing Officer concludes that the Taxpayer would still have had reasonable cause for failure to file and pay taxes at the time of the "B" sale.

Based on all the above, the Taxpayer's protest of the speculative builder tax is denied, and the Taxpayer's protest of the penalties on the "B" sale is granted.

### **FINDINGS OF FACT**

1. On September 27, 2001, Taxpayer filed a letter of protest of the City Tax Assessment.
2. On October 1, 2001 the City filed a finding that the protest was in the proper form but was not timely.
3. On October 9, 2001, the Taxpayer filed its response on the timeliness issue.
4. Based on the additional information filed by the Taxpayer, the City concluded in its October 24, 2001 letter that the protest was timely.
5. On December 10, 2001, the City filed its response to the protest.
6. The matter was set for hearing commencing on February 27, 2002.
7. Taxpayer is the owner and developer of a six lot residential subdivision.
8. In June of 2000, the Taxpayer sold an improved lot (the "A" property).
9. In April of 2001, the Taxpayer sold a second improved lot (the "B" property).
10. The Taxpayer was not aware of the speculative builder tax at the time he sold the "A" property.
11. The Title Agencies informed the Taxpayer that there was no City tax on the sale of his properties.
12. On February 1, 2001, the City contacted the Taxpayer and explained the speculative builder tax to him.

13. At the time the "B" property was sold in April of 2001, the Taxpayer did not fully comprehend the speculative builder tax.

### **CONCLUSIONS OF LAW**

1. Pursuant to ARS Section 42-6056, the Municipal Tax Hearing Officer is to hear all reviews of petitions for hearing or redetermination under the Model City Tax Code.

2. Section 416 imposes a tax on speculative builders on the selling price of improved property.

3. Section 540(b)(1) imposes a penalty for failure to file a timely return unless taxpayer shows that the failure is due to reasonable cause and not willful neglect.

4. Section 540(b)(2) imposes a penalty for failure to pay the tax when due unless the taxpayer shows that the failure is due to reasonable cause and not willful neglect.

5. The Taxpayer has shown reasonable cause for failing to report and failing to pay the tax due on the sale of the "A" and "B" properties.

6. The Taxpayer's protest of the speculative builder tax should be denied.

7. The Taxpayer's protest of the penalties imposed should be granted.

### **ORDER**

It is therefore ordered that the September 27, 2001, protest filed by Taxpayer should be denied in part and granted in part consistent with the discussion herein.

It is further ordered that the City of Phoenix shall revise the tax assessment of Taxpayer by removal of the penalties imposed on the sale of the "B" property.

It is further ordered that this decision is effective immediately.

Dated: April 12, 2002

Jerry Rudibaugh

Municipal Tax Hearing Officer